

No. 335

PUBLIC WELFARE—MARRIAGE—MINORS—ANNULMENT—CHILDREN—CHILD WELFARE SERVICES

- Held: 1. In this state males under the age of 18 years and females under the age of 16 years may not legally marry regardless of the consent of parents, and marriage contrary to this provision may be annulled.
2. Clerks of Court may not issue marriage licenses when one of the parties to the proposed marriage is a male under the age of 18 or a female under the age of 16.
3. Clerks of Court may, in their discretion, require information under oath with respect to age of applicant for marriage license.
4. Marriage of children does not remove them from the jurisdiction or supervision of the Department of Public Welfare.
5. Each individual case involving married children should be handled according to the facts involved therein.

Mr. J. B. Convery, State Administrator
Department of Public Welfare of
The State of Montana
Helena, Montana

Attention: Mr. John Coey, Director
Child Welfare Services

Dear Mr. Convery:

You have pointed out a number of child marriages have occurred in this state recently and request the opinion of this office whether the State Department of Public Welfare, through its Division of Child Welfare Services, has any responsibility with respect to such marriages and, if so, what procedure should be followed with respect to such responsibility.

In your letter requesting the opinion you refer to Sections 5695 and 5712 of the Revised Codes of Montana, 1935, which, respectively, define marriage and provide that if either party is a minor no marriage "license shall be granted without the written consent of the father, if living; if not, then of the mother of such minor child or of the guardian or person under whose care and government such minor may be."

Section 5696 of the Revised Codes of Montana, 1935, defines the age of consent to marriage as 18 years or upwards for males and 16 years or upwards for females. That section and the other sections above cited have the effect of making a marriage voidable which was purportedly consummated between parties one of whom was either a male under the age of 18 years or a female under the age of 16 years, as such persons are not of an age to consent to marriage, whether or not the parents are agreeable and give consent. A former Attorney General has held a marriage contract between persons not of legal age to consent to marriage is void. (Vol. 3, Opinions of the Attorney General, 279, 280.) It is apparent from the statutes a Clerk of the Court may not issue a license to marry when one of the parties is a male under 18 years of age or a female under 16 years of age, even though the parents consent. (Vol. 10, Opinions of the Attorney General, 195.) I agree with this conclusion.

In the strict legal sense, a marriage which involves a party below the age of consent is perhaps not *ipso facto* "void," as expressed by the former Attorney General above referred to, but is, rather, "voidable"—since an action for annulment in the district court establishing the facts is required in order to set the marriage aside. See Chapter 5 of the Civil Code of the Revised Codes of Montana of 1935.

Notwithstanding the intention of the statutes that males under 18 years of age and females under 16 years of age shall not marry, regardless of consent of parents, your letter indicates such marriages do take place. Licenses have apparently been issued on false statements of applicants for license or of parents or guardians. In this connection it is noteworthy the Clerk of Court may, in his discretion, require that information for securing a license be given under oath; and it is required any application made by mail for marriage license must be accompanied by affidavit under oath. (Section 5715 of the Revised Codes of Montana, 1935.) Use of this provision by Clerks of Court in instances where the eligibility of parties to a proposed marriage is questionable may deter persons ineligible to marry because of nonage or may deter their parents' or guardians' making false statements to secure a license.

When a marriage has purportedly taken place between persons under the age of consent, such procedure does not remove the child from the jurisdiction or supervision of the Department of Public Welfare, as provided for in Part VI of Chapter 82 of the Laws of 1937, or remove the responsibility of that Department with respect to its duties and powers set out therein. The Department of Public Welfare may still supervise and protect such children and take such steps as are necessary to that end. No general rules or procedure may be laid down with respect to such children. Each individual case must be handled according to the facts involved therein and with the general purpose of protecting and caring for homeless, dependent and neglected children and children in danger of becoming delinquent.

Sincerely yours,

JOHN W. BONNER
Attorney General